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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNION ASPHALTS and ROADOILS, INC., *et al.*,
Petitioners,

vs.

MO-KAN TEAMSTERS PENSION FUND, *et al.*,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1. CONTRARY TO THE ARGUMENT OF MOKAN TEAMSTERS PENSION FUND IN ITS BRIEF, IN REVIEWING AN ARBITRATOR'S CONCLUSIONS OF LAW FROM AN ARBITRATION CONDUCTED PURSUANT TO THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980, THE FEDERAL COURTS MUST APPLY THE STANDARD OF REVIEW CONTAINED IN THE UNITED STATES ARBITRATION ACT AND MUST NOT CONDUCT A DE NOVO REVIEW.

With over a million workers affected and with untold wealth involved in all multiemployer pension plans, this Court must determine the appropriate standard of review the federal courts must apply in reviewing an arbitrator's *conclusions of law* resulting from an arbitration conducted pursuant to the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §1381 et seq.) ("MPPAA"). Union Asphalts and Roadoils, Inc. ("Union Asphalts") contends that the federal courts must apply the standard of review set forth in the United States Arbitration Act since MPPAA expressly incorporates that Act and its standard of review. 29 U.S.C. §1401(b)(2), (b)(3); MPPAA §4221(b)(2), (b)(3).

Under the United States Arbitration Act, the arbitrator's conclusions of law can only be reversed (i) if the award was procured by fraud, corruption or undue means, (ii) based on misconduct by the arbitrator, or (iii) if the arbitrator exceeded his power or imperfectly executed his power. 9 U.S.C. §10. It is uncontroverted that none of these bases exists for overturning the arbitrator's conclusions of law in this case, and, therefore, the arbitrator's conclusion that Union Asphalts is exempt from withdrawal liability must be affirmed.

On the other hand, the Mo-Kan Teamsters Pension Fund (the "Fund") contends that the federal courts are entitled to conduct a *de novo* review of the arbitrator's conclusions of law. Based on this interpretation of MPPAA, the Fund argues that the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit appropriately exercised their jurisdiction (i) in reversing the arbitrator's conclusion of law that Union Asphalts was exempt from withdrawal liability and (ii) in imposing $134,380.00 of withdrawal liability on Union Asphalts.

In its Brief in Opposition, the Fund failed to address the cases cited by Union Asphalts setting forth this Court's express favor of a public policy supporting arbitration as a method of dispute resolution. (Petitioners' Petition, pp. 12-13). This Court has repeatedly expressed its confidence in an arbitrator's ability to resolve complex factual and legal issues and is obviously satisfied with the role of the federal courts in reviewing arbitration opinions which are governed by the United States Arbitration Act. The Fund obviously failed to address these seminal cases and this Court's policy favoring arbitration since the Fund had no meaningful response. The Fund's failure to rebut this argument and these cases confirms that the federal courts must apply the standard of review in the United States Arbitration Act when reviewing an arbitrator's conclusions of law.

The Fund misstates Union Asphalts' argument when the Fund states that ". . . an arbitrator's legal decisions and statutory interpretations are final and not reviewable by the federal courts. . . ." (Respondent's Brief, p. 15). Union Asphalts has never taken this position and

has always argued that the conclusions of law are reviewable by the federal courts pursuant to the standard of review in the United States Arbitration Act. Clearly, the federal courts can reverse an arbitrator's decisions of law under the United States Arbitration Act but the Fund failed to plead any of the requisite grounds under that Act to reverse the arbitrator's decision in this case.

The Fund erroneously argues that there is no conflict between the United States Court of Appeals for the Eighth Circuit on the one hand and the United States Court of Appeals for the Third and District of Columbia Circuits on the other hand with respect to the standard of review for an arbitrator's conclusions of law. In *Washington Star Company v. International Typographical Union Negotiated Pension Plan,* 729 F.2d 1502, 1505 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia expressly held that the federal courts "must enforce the arbitrator's decision in accordance with the United States Arbitration Act, 9 U.S.C. §§1-14 (1982), which authorizes only limited review."

In *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell,* 787 F.2d 128, 139 (3rd Cir. 1986), *aff'd by an equally divided court,* 481 U.S. 735 (1987), the United States Court of Appeals for the Third Circuit expressly held that the federal courts do not have *plenary* review of the arbitrator's conclusions of law.

The United States Court of Appeals for the Third Circuit and the District of Columbia Circuit could not have been clearer in stating that the standard of review of an arbitrator's conclusions of law is controlled by the United States Arbitration Act and that only limited

review is available. The Fund's analysis to the contrary does not withstand close scrutiny and the express holdings of these Courts are directly contrary to the holding of the United States Court of Appeals for the Eighth Circuit on the proper standard of review by the federal courts of an arbitrator's decision.

The Fund further argues that Union Asphalts' argument with respect to the standard of review in the United States Arbitration Act would nullify §1402(b)(2) of MPPAA. (Respondent's Brief, p. 21). The Fund fails to explain how this nullification would occur and cites no meaningful facts or law to support this exaggeration. Section 1401(b)(3) provides that the standard of review in the United States Arbitration Act controls unless it is inconsistent with an express provision of MPPAA. Section 1401(b)(2) of MPPAA is not inconsistent with the United States Arbitration Act since the federal courts can enforce, vacate or modify the arbitrator's award as required under Section 1401(b)(2) but subject to the standard of review contained in the United States Arbitration Act.

The only express inconsistency between MPPAA and the United States Arbitration Act centers on the standard of review of the arbitrator's findings of fact. Section 1401(c) provides that when the federal courts review an arbitrator's decision, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." Thus, MPPAA expressly provides a different standard of review than the United States Arbitration Act with respect to the arbitrator's findings of fact. However, MPPAA is silent with respect to the standard of review of the arbitrator's conclusions of law, and,

therefore, the United States Arbitration Act must control. Thus, §1401(b)(2) is not nullified but is given meaning consistent with MPPAA and its legislative history regarding the significance of arbitration resolving MPPAA disputes. The Fund's position requiring *de novo* review of the arbitrator's conclusions of law by the federal courts guts MPPAA and makes the mandatory arbitration proceeding meaningless since the federal courts have the opportunity to rehash the decision by the arbitrator.

Finally, the Fund misunderstands Union Asphalts' argument regarding the constitutionality of MPPAA. In *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984), the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of MPPAA's dispute resolution procedure by holding that the arbitrator's conclusions of law are subject to *de novo* review by the federal courts, and therefore, an employer can obtain effective judicial review of an arbitrator's legal rulings. Union Asphalts contends that MPPAA's dispute resolution procedures, including mandatory arbitration, pass constitutional muster even if the federal courts exercise a more limited standard of review of the arbitrator's conclusions of law under the United States Arbitration Act. Five Circuit Courts of Appeal have rejected constitutional challenges to MPPAA without relying on *de novo* review of an arbitrator's conclusions of law. (Petitioners' Petition, pp. 17-18).

Union Asphalts requests that this Court grant its Petition for Writ of Certiorari to resolve the conflict

and confusion regarding the appropriate standard of review of an arbitrator's conclusions of law from an arbitration conducted pursuant to MPPAA. The Fund concedes that since 1980 there are hundreds of cases involving MPPAA (Respondents' Brief, p. 16) and there will be even more cases in the future. The lower courts need guidance from this Court to properly review these decisions.

2. THE ISSUE OF DEFINING THE BUSINESS AND CONSTRUCTION INDUSTRY EXEMPTION TO WITHDRAWAL LIABILITY UNDER MPPAA IS AN IMPORTANT AND UNRESOLVED QUESTION OF FEDERAL LAW THAT MUST BE ADDRESSED BY THIS COURT.

The Fund erroneously argues that Union Asphalts' Petition is not appropriate under Rule 17 of the Rules of the Supreme Court by virtue of the Fund's own misplaced assumption that the issue of defining the building and construction industry exemption under MPPAA is not an important question of federal law. Such an assumption completely ignores the opinion of the Pension Benefit Guaranty Association (PBGC). The PBGC recognized that many have tried and failed to define the "building and construction industry" for purposes of withdrawal liability under MPPAA and that this is a "critical" term because "plan sponsors may have difficulty determining":

1. whether the subject pension plan is a construction plan;

2. whether the subject withdrawing employer is a construction employer; and

3. when the subject plan or employer is eligible for the special rules of withdrawal liability.

See Pens. Plan Guide (CCH) ¶23,678R, at 25,107-29.

As was extensively discussed in Union Asphalts' Petition for Writ of Certiorari, there is a very present and compelling need for a clear definition of the building and construction industry which is tailored to the intent of Congress when it created the exemption to withdrawal liability under MPPAA. Clearly, Union Asphalts' Petition before this Court is proper under Rule 17.1(c) of the Rules of the Supreme Court, and the Fund's Suggestion to the contrary must be rejected by this Court.

3. THE FUND'S ASSERTED DEFINITION OF THE BUILDING AND CONSTRUCTION INDUSTRY EXEMPTION UNDER MPPAA, AS WELL AS THE DEFINITION OF THE TERM POSED BY THE EIGHTH CIRCUIT COURT, COMPLETELY IGNORES THE INTENT OF CONGRESS IN CREATING THE EXEMPTION.

Union Asphalts must point out one glaring omission concerning the Fund's Brief in Opposition. The Fund has failed to make any reference whatsoever to the intent of Congress when it drafted the building and construction industry exemption of withdrawal liability under MPPAA. Simple logic dictates that any definition for a phrase that controls whether or not withdrawal liability is imposed under MPPAA must be guided by the intent of Congress in creating the building and construction industry exemption. The legislative history clearly expresses that the building and construction industry exemption was designed to limit the imposition of withdrawal liability for only those instances that pose

an undue threat to the funding base of the plan. The exemption was intended to impose liability only on former contributors that continue to work within the plan's area. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2943.

Similarly, this Court must consider the characteristics of the building and construction industry which Congress expressed in the legislative history of MPPAA. *Report, supra,* U.S. Code Cong. & Admin. News at 2943. For purposes of this Reply Brief, it is not necessary to set forth the characteristics of the industry as contained in the legislative history of MPPAA since they were extensively discussed in the Petition for Writ of Certiorari together with a comparison to the operations of Union Asphalts. The comparison highlighted how well each legislative characteristic described Union Asphalts' business in each and every aspect including, but not limited to, fluctuation of employees and business cycle. *See* Petitioners' Petition, pp. 26-29. At this juncture, it is important for this Court to recognize that the Fund's asserted definition of the building and construction industry lacks any reliance on the intent of Congress in creating the exemption and the legislatively expressed characteristics of the industry. The Fund's definition of the industry and the Eighth Circuit Court's affirmation of that definition must, therefore, be rejected by this Court.

Finally, the Fund's Brief in Opposition also incorrectly urges this Court to consider Section 8(e) of the Taft-Hartley Act, 29 U.S.C. §158(e), in defining the building and construction industry for purposes of withdrawal liability under MPPAA. The reference to Sec-

tion 8(e) is inappropriate for defining the building and construction industry for MPPAA and the Arbitrator, District Court, and Eighth Circuit Court of Appeals agree that Section 8(e) of the Taft-Hartley Act is not useful in establishing a definition for the industry. As discussed in the Petition for Writ of Certiorari, the case law under Section 8(e) conflicts with the case law under Section 8(f), which is the only section in the Taft-Hartley Act that references the identical "building and construction industry" phrase used in MPPAA. The Fund obviously wants this Court to consider the case law under Section 8(e) in order to impose a misplaced on-site standard for a definition of the construction industry. This standard conflicts with the case law under Section 8(f) of the Taft-Hartley Act, such as *A. L. Adams Construction Company v. Georgia Power Company,* 733 F.2d 853 (11th Cir. 1984), wherein the Eleventh Circuit Court of Appeals recognized that the building and construction industry is very broad in scope and not limited to work that is performed "on-site." *See Id.* at 854. The Ninth Circuit Court of Appeals' decision in *Operating Engineers Pension Trust v. Beck Engineering and Surveying Company,* 746 F.2d 557 (9th Cir. 1984), also recognized that the on-site limitation, as asserted by the Fund, was insufficient to define the building and construction industry. Instead, the Court in *Operating Engineers* ruled that a determination of whether an employer is to be considered in the construction industry must be guided by whether the subject employer's work was performed "in conjunction with specific construction projects." *Id.* at 564. In the present case, the Arbitrator's Opinion set forth a myriad of facts which dramatically illustrated how Union Asphalts' operations were devoted entirely to specific construction projects. (*See* Petitioners' Peti-

tion, pp. A30-32). The Arbitrator found that Union Asphalts sold its product only to entities engaged in road construction, and Union Asphalts' operations were controlled by the same weather conditions that controlled the construction projects. When it was too cold to apply asphalt material at the project site, Union Asphalts could not work. *Id.*

When this Court considers that Congress only intended to impose liability on those entities that posed a threat to the plan, and that Union Asphalts' operations are identical to the legislatively expressed characteristics of the industry, then this Court must agree with the Arbitrator's ruling: "[W]hen [Union Asphalts'] operation is viewed as a whole, it is clear that [Union Asphalts] and its employees are deeply involved in the road construction business." *Id.* at A31-32. Accordingly, the Court is urged to issue a Writ of Certiorari and review the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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